ROBINSON *v.* COMMONWEALTH.

Feb. 2, 1906.

[52 S. E. 690.]

1. Embezzlement—By Public Officer.—Code 1904, § 723, requires a justice to pay over fines within 30 days after collecting the same, and imposes a penalty for his failure so to do. Section 3717 makes it a criminal offense for any state or municipal officer having custody of public funds to knowingly misuse or misappropriate the same. Held, that where a justice of the peace imposes and collects a fine, and not only fails to pay the same over, but feloniously misuses and misappropriates the same, he is indictable under section 3717.

2. Jury—Disqualification of Jurors—Expressions as to Guilt.—That a juror has stated in effect that he would convict defendant if he sat on any jury which tried him does not disqualify the juror, where the statement was made with reference to a previous indictment against defendant preferred by a grand jury of which the juror was a member, but which was not connected with the indictment on the trial of which the juror was examined, and the juror further stated that he could give defendant a fair and impartial trial without reference to what he had heard on the grand jury or otherwise.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 440, 461.]

3. Embezzlement—By Public Officer—Evidence—Practice in Similar Cases.—In a prosecution of a justice under Code 1904, § 3717, for embezzling money collected by him as a fine, evidence as to the practice of defendant and other magistrates with reference to paying over fines was properly excluded.

4. Same—Defense—Restitution.—In a prosecution of a justice, under Code 1904, § 3717, for embezzling money collected by him as a fine, the fact that defendant made restitution of the fruits of his crime after the completion of the offense was no defense.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 32-34.]

5. Same—Venue—Sufficiency of Evidence.—In a prosecution of a justice, under Code 1904, § 3717, for embezzling money collected by him as a fine, it is only necessary to show that the offense was committed in a county over which the court has jurisdiction, and it is unnecessary to show the magisterial district for which the justice acted in collecting the fine.

6. Same—Indictment—Variance.—In a prosecution of a justice, under Code 1904, § 3717, for embezzling money collected by him as a fine, a conviction may be had on showing the misappropriation of a part of the sum charged in the indictment.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 55, 56.]

7. Criminal Law—Instructions—Sufficiency of Instructions Given.—An instruction requested by accused, which is the same in legal effect as an instruction given by the court, may be refused.

8. Same—Appeal—Harmless Error—Argument of Counsel.—A remark of the prosecuting attorney in arguing to the jury, the effect of which, standing alone and segregated from its context, was to incorrectly state the law, was not ground for reversal, where the jury was properly instructed by the court, and the court certified that accused was not prejudiced by the language used.

9. Embezzlement—Sufficiency of Evidence.—In a prosecution of a justice, under Code 1904, § 3717, for embezzling money collected by him as a fine, evidence held sufficient to authorize a conviction.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3127.]

Error to Circuit Court, Warwick County.

Charles H. Robinson was convicted of embezzlement of public funds, and brings error. Affirmed.

C. C. Berkeley and *F. S. Collier*, for plaintiff in error.

The Attorney General, *Wm. A. Anderson,* and *Ashby & Read,* for the Commonwealth.

KEITH, P. An indictment was found in the circuit court of Warwick county against Charles H. Robinson, which charges that he, being a justice of the peace of Newport magisterial district, in said county, by virtue of his office aforesaid, had the custody of a certain sum of money, public funds of the state of Virginia, to wit, the sum of $5, which he was required by law to pay to the clerk of the circuit court of the county aforesaid, and which he "feloniously and knowingly did misuse and misappropriate, * * * and did then and there feloniously and knowingly dispose of the said money and public funds otherwise than by paying the same to the clerk of the circuit court of Warwick county, Virginia, in accordance with law, and so the jurors aforesaid, upon their oath aforesaid, do say that the said Charles H. Robinson then and there in manner and form aforesaid feloniously and knowingly did steal, take, embezzle, and carry away, the said money and public funds aforesaid, to wit, the sum of five dollars, currency of the United States, of the value of five dollars, the money and public funds of the state of Virginia. Against the peace and dignity of the commonwealth of Virginia."

There was a motion to quash and a demurrer interposed to this indictment. We deem it necessary to consider only the demurrer.

The plaintiff in error contends that the indictment is based upon section 723 of the Code of 1904, which provides:

"If any fine is received by the justice imposing it, he shall pay the same, with the cost, within thirty days thereafter, to the clerk of the circuit court of his county or corporation court of his city. For failure to make such payment within said time, without good cause, he shall forfeit twenty dollars, which, together with the money so received, may be recovered by motion."

This statute fixes the duty of the justice. When he imposes and collects the fine, he must, by its terms, pay the same, together with the costs, within 30 days to the clerk of the court of his county or corporation; and for failure to make such payment he forfeits $20, which may be recovered from him by motion, together with the money so received. But that is not the offense with which plaintiff in error was charged. He was prosecuted under section 3717, which is as follows:

"If any officer, agent, or employee of the state or of the city, town or county or the deputy of any such officer having custody of public funds knowingly misuse or misappropriate the same or knowingly dispose thereof otherwise than in accordance with law, he shall be confined in the penitentiary not less than one nor more than ten years, and if any default of such officer, agent, employee, or deputy in paying over said funds to the proper authorities when required by law to do so shall be deemed prima facie evidence of his guilt."

The two sections are wholly dissimilar. The first refers to the failure to pay over; the second to the knowing misuse or misappropriation of the funds of the state. It is true that the detention of the money is one of the elements constituting the offense punished under section 3717, but it does not constitute the offense itself; for money may be detained without being misappropriated, which is the evil for which section 723 was designed as a remedy. But it may also be detained with fraudulent and felonious intent to misuse and misappropriate, which brings the case within the terms of section 3717.

We are of opinion that the indictment is sufficient, and that the demurrer was properly overruled.

While the jury were being selected for the trial of this case, plaintiff in error challenged one of the veniremen who had been sworn upon his voir dire, and asked him if he had not, at a time and place named in the question, said, "Charley Robinson don't want me to sit on any jury that tries him, and would know that he is a goner if I sit on any jury that tries him." To which the juror replied that he had made such a statement, and meant that, if the evidence was as strong in this case as it was in the one before the grand jury on which he sat when Robinson was indicted on a former occasion, he would convict him. The grand jury here alluded to was not connected at all with this prosecution. The court then asked the juror if there was any

impression on his mind made by what he had heard about the accused, or by what he had heard on the grand jury in the case referred to, that would require evidence to remove it, to which he replied that there was not, but that he could give the accused a fair and impartial trial without reference to what he had heard about the accused, either on the grand jury or otherwise. Thereupon the juror was received by the court, and the plaintiff in error excepted.

This subject was recently considered by this court in the case of McCue *v.* Commonwealth, 103 Va. 870, 49 S. E. 623, and the conclusions reached are thus stated in the syllabus: "The trend of recent decisions is in the direction of limiting, rather than extending, the disqualification of jurors by reason of mere opinion, hence the courts inquire into the character of that opinion. If it is a decided or substantial opinion as to the guilt or innocence of the accused, no matter upon what ground formed, the juror is incompetent; but if the opinion is merely hypothetical, and the court is satisfied from an examination of the juror on his voir dire, or otherwise, that he is not biased or prejudiced, and that he can give the prisoner a fair and impartial trial according to the law and the evidence, he should be accepted. No fixed and invariable rule can be laid down whereby to test the competency of jurors, but each case should be determined by its own facts and circumstances, and great weight should be attached by an appellate court to the opinion of the trial judge."

Applying this principle to the case before us, we are of opinion that there was no error in the ruling of the circuit court.

The third assignment of error is to the exclusion of certain evidence offered by the accused.

The bill of exceptions is as follows: "That at the trial of this cause, after the accused had been arraigned and the jury impaneled to try the issue, and while the accused was testifying in his behalf, relative to the reasons why he had not paid the fine and the costs, shown in the evidence, to the clerk of the court, he started to state that it was his practice, and that of other magistrates and police officers down there. To further testimony along this line the commonwealth here objected, by counsel, which objection the court sustained, to which ruling and opinion of the court in sustaining the said objection the accused by his counsel excepted, and tenders this bill of exception, which he prays may be signed," etc.

If the prisoner's conduct was in accordance with the law, it did not need to be supported by the practice of others. If it was not in accordance with the law, the fact that others violated the law would furnish no justification or excuse to him. We see no merit in this assignment of error.

After the evidence was introduced, the court, at the instance of the commonwealth, gave the jury two instructions. The first instruction is as follows:

"The court instructs the jury that a payment made to the clerk 30 days after the receipt by a justice of public funds does not excuse a crime, if any, committed because of the failure of an earlier payment."

If the crime was complete, if the prisoner had knowingly misused or misappropriated the funds of the state, his subsequent restitution of the fruits of his crime could not relate back, so as to efface the wrong.

The second instruction is "that the law requires that a justice of the peace, within 30 days after the receipt of any fine imposed by him, do pay such fine, with the cost, to the clerk of the circuit court of his county; and if the jury shall believe from the evidence that C. H. Robinson, while a justice of the peace for this county, received a fine of $5 of Charlie Sacriensce, imposed by him as such justice, and instead of paying the same within 30 days after such receipt by him [Robinson] to Mr. Burnham, clerk, knowingly misused or misappropriated the same, or knowingly disposed thereof otherwise than in accordance with the law, it is the duty of the jury to find him guilty, and to fix his confinement in the penitentiary at not less than 1 nor more than 10 years."

This instruction raises again the question considered with respect to the demurrer to the indictment. It is a correct statement of the law as set out in sections 723 and 3717, in the first of which it is made the duty of officers to pay over the fine within 30 days after its receipt, and in the last of which the knowing misuse or misappropriation of public funds is made a felony, punishable by confinement in the penitentiary for not less than 1 nor more than 10 years.

The plaintiff in error offered certain instructions, numbered 1, 2, 3, 4, and 5, the second of which was given without objection. The fourth, as offered, is in the following words:

"The court instructs the jury, that unless they believe from the evidence that the accused knowingly misused or misappropriated, or knowingly disposed of otherwise than in accordance with law, a fine of $5, collected by him as justice of the peace of Newport magisterial district in the county of Warwick, which $5 were funds of the state of Virginia, as alleged in the indictment, then they must find him not guilty."

The court struck out the words "Newport magisterial district in," and to this action plaintiff in error excepted.

It is true that the words stricken from this instruction are found in the indictment, but they were not material, may be re-

garded as surplusage, and their rejection was not harmful. To bring the crime within the jurisdiction of the court it is only necessary to show the county in which it occurred; that county being one over which the court has jurisdiction.

Instructions 1, 3, and 5 were refused.

Instruction No. 1 made the guilt of the accused to depend upon his having misappropriated the full amount of $5, and would have required an acquittal, although the evidence had shown the misappropriation of a part of it.

The third instruction directed the jury to acquit, unless they found from the evidence that the accused was a justice of the peace for Newport magisterial district, in the county of Warwick, on the 15th day of August, 1904, as alleged in the indictment, and presents the question already considered in disposing of the modification of instruction No. 4.

The fifth instruction is as follows: "The court instructs the jury that, before they can find the accused guilty of the charge alleged in the indictment, they must believe that he knowingly, feloniously, and with an intent to defraud the state of Virginia, misued, misappropriated, or disposed of otherwise than in accordance with law the $5, or funds of the state of Virginia, as in the indictment alleged."

In legal effect, the instruction, as offered by plaintiff in error, is the equivalent of that given by the court, in which the jury were told that, to constitute the crime with which the plaintiff in error was charged, they must believe from the evidence that he, while a justice of the peace of Warwick county, had knowingly misused or misappropriated a fine imposed by him as such justice.

The next assignment of error is that the attorney for the commonwealth, in the course of his argument before the jury, used the following language: "That if the accused knowingly disposed of the fine or any part of the same, like keeping it and putting it in bank, otherwise than by paying it to the clerk of the court within 30 days, it is a violation of the law, and the accused should be convicted as charged in the indictment"—to which the accused, by counsel, objected, which objection the court, being of the opinion that the accused was not prejudiced by the words objected to, they being simply a detached part of the argument, overruled, to which ruling of the court the accused, by counsel, excepted.

As we have said in discussing another branch of the case, the detention of the money is a part, and a necessary part, of its misappropriation. Detention does not necessarily constitute misappropriation, but there could be no misuse or misappropriation without detention, though it is true that detention that continues

for 30 days, standing alone, would not complete the offense under section 3717. We have found that the jury was properly directed by the court, and we cannot think that in the face of proper instructions the jury could have been misled to the prejudice of the prisoner by a remark made by the prosecuting attorney, which the court certifies was "a detached part of the argument." That is to say, we are asked to reverse the judgment of the court because a sentence, separated and segregated from its context, is an incorrect statement of the law, when the court, which heard the whole address of counsel and was in a position to consider it, not in its disjointed parts, but as a whole, certifies to us that the accused was not prejudiced by the language used. We are of opinion that this assignment of error should be overruled.

The last assignment of error is to the refusal of the court to set aside the verdict as being contrary to the evidence, and in arrest of judgment.

The facts show that the plaintiff in error was a justice of the peace for Warwick county; that he issued a warrant charging Charles Sacriensce with a misdemeanor; that on August 15, 1904, he entered judgment of conviction; that the fine imposed was $5; and that this fine had been paid to him in his capacity as a justice of the peace. These facts appear from the testimony of the clerk of the circuit court of Warwick county, and the report sheet furnished him by the accused. Plaintiff in error, who was sworn in his own behalf, testifies that on Sunday, the 14th of August, Charles Sacriensce was arrested on a warrant issued by him, and brought to the station house, where he bailed him, charging him 60 cents for it, that the accused put up $5 collateral for his appearance the next day; that he did not appear the next day, and witness had never seen or heard of him since; that witness took from the $5 the fees of the constable, amounting to $1.70, and his own fees amounting to $1, the clerk's fees of $1.25, and the $1.05 due the state, and that he afterwards wrote up a mittimus for the man, and credited upon the back of the mittimus the $5 collateral; and that he deposited in bank the $1.05 due the state and the $1.25 due the clerk. He then tendered the $1.05 due the state, and stated that he was ready to pay to the clerk anything more due the state by him. He stated that he had always intended to pay what he had of this fine to the clerk, and certainly would not have made a report of it if he had intended to steal it; that he knew better than that; that he wanted to collect the balance of the fine, but Charlie Sacriensce never was found; that he never did try and convict the defendant; and that his report was wrong in showing that he fined him $5. At this point in the examination of Robinson, the attorney for the commonwealth

handed him a warrant, which was in the following words and figures:

"Whereas, John A. Williamson, acting chief of police of the said county, has this day made complaint and information on oath before me, C. H. Robinson, a justice of the peace of the said county, that Charlie Sacriensce of the said county, on the 14th day of August, 1904, in the said county did unlawfully create a nuisance by indecently exposing his person by bathing in a nude condition in the James river between Dawson City and Klondike, of said county, in the presence of divers persons, both ladies and gentlemen, against the statutes made and provided in such cases.

"These are, therefore, in the name of the commonwealth, to command you forthwith to apprehend and bring before me, a justice of the peace of said county, the body of the said Charlie Sacriensce to answer to said complaint, and to be further dealt with according to law.

"Given under my hand and seal this 14th day of August in the year 1904.

"C. H. Robinson, J. P."

Indorsed:

"Commonwealth *v.* Charlie Sacriensce."

"Warrant of arrest. Executed this 14th August, 1904, by John A. Williamson.

"After hearing the evidence in the case the defendant Charlie Sacriensce was found guilty as charged in the warrant and his punishment ascertained to pay a fine of $5.00 and pay costs of the prosecution. Costs $3.95.

"This the 15th day of August, 1904.

"C. H. Robinson, J. P."

After showing these papers to the witness, the attorney for the commonwealth then said to him: "You said you did not try or fine this man, and this warrant and indorsement thereon show differently. How do you account for that?" And the witness replied: "I did not mean to say I did not fine him. I said he was not found. That he was tried in his absence, and a mittimus was issued for him, but he was never found." The witness further said that the warrant was his warrant, and he entered the judgment on the back of it that he had fined Sacriensce $5 and $3.95 as costs, as appeared on the warrant.

Upon this evidence, after being instructed as we have seen, the jury returned a verdict finding the plaintiff in error guilty as charged in the indictment, and fixing his punishment at one year

in the penitentiary. Upon that verdict the circuit court overruled a motion for a new trial and in arrest of judgment, sentenced the prisoner; and we are of opinion that the record discloses no error.

The judgment is affirmed.

Note.

Embezzlement—Construction of Statute.—A statute defining a crime or offense such as embezzlement can not be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within reason and spirit of the statute. State *v.* Meyers, 56 O. St. 340, 47 N. E. 138.

Jurors—Disqualification.—The early Virginia cases dealing with the disqualification of jurors on the ground of an expression of opinion as to the guilt of the accused seem to announce the rule as laid down in McCue *v.* Com., 103 Va. 870, 49 S. E. 623, see Wright *v.* Com., 32 Gratt. 941, and note. See also, monographic note on "Juries," appended to Chahoon *v.* Com., 20 Gratt, 733.

In Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444, which was a prosecution upon an information filed by the county attorney charging a public officer with embezzlement of public money, it was held, that an opinion formed by a juror does not affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the offense charged. This case seems to be on all fours with the case under discussion.

Usage or Custom as Defense to Crime.—A custom or usage repugnant to the commands of a statute will not prevail against such statute. Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444.

In Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444, an information was filed against a city treasurer charging him with embezzlement of public moneys, for disbursing public funds in a manner forbidden by the statute, the court said: "When the defendant turned over his office to his successor, Mr. Dumont, there were in the cash drawer, carried as cash, slips and memorandum checks, aggregating about $24,000, representing that amount of public funds which he had paid out to, and which were carried as charges against, various persons, mostly city employees and contractors with the city. The defendant offered to show that it had been the custom of the various city treasurers who had preceded the defendant in office to so pay out ctiy funds. The offer was rejected, and such ruling is assigned as error. The fact, if it be a fact, that the money represented by said slips and checks in the cash drawer was paid out in pursuance of a custom, with the knowledge of the city authorities, did not make the transaction in question lawful. The disbursement of public funds in that manner was in violation of law, a practice in the highest degree reprehensible, and constituted embezzlement, notwithstanding the transaction was openly done, with knowledge of the entire city government, and might be sanctioned by a custom or usage as old as the Mosaic law."

On an indictment for indecent exposure of the person while bathing in a public place, the custom of others, long acquiesced in, to so conduct themselves was held no defense. Reg *v.* Reed, 12 Cox. C. C. 1.

Arguments of Counsel.—It is well settled that the prejudicial effect

of improper arguments of counsel may be averted and cured by instructing the jury to disregard such statements of counsel. State *v.* Johnson, 1 Ired L. (N. Car.) 354 (misrepresentations of law); Keck *v.* Bode (Ohio), 13 O. C. D. 414; Davis *v.* State (Ohio), 20 O. C. C. 430, 10 O. C. D. 739, affirmed in 63 O. St. 173, 57 N. E. 1099, (reference to matter not in issue); Convention of Church *v.* Crocker (Ohio), 7 O. C. C. 327, 4 O. C. D. 619 (reading extracts from books not in evidence).

Repetition of Instructions.—As to right to instructions on points already covered by previous instructions, see monographic note on Instructions, appended to Womack *v.* Circle, 29 Gratt. 192.